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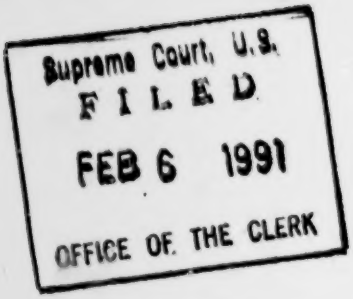

No. ___

In The

Supreme Court of the United States

October Term, 1990

Humphreys (Cayman) Limited,
Petitioner,

v.

Dorothy A. Wilson And Louie P. Wilson,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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QUESTION PRESENTED

Whether a foreign corporation that operates a hotel in another country may, consistently with due process, be forced to defend in the state of Indiana an action arising from injuries suffered in the foreign hotel.

PARTIES

The appellants in the court of appeals were Humphreys (Cayman) Limited and Holiday Inns, Inc. The appellees were Dorothy A. Wilson and Louie P. Wilson. Humphreys (Cayman) Limited's parent corporation is Humphreys Overseas Development Company, Ltd. Humphreys (Cayman) Limited has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional provisions involved	2
Statement	2
Reasons for granting the petition	4
Conclusion	5
Appendix:	
A. Opinion of the United States Court of Appeals for the Seventh Circuit (October 24, 1990)	1a
B. Opinion of the United States District Court for the Southern District of Indiana (March 25, 1988)	20a
C. Denial of Petition for Rehearing (November 21, 1990)	43a

TABLE OF AUTHORITIES

	Page
Case:	
Shute v. Carnival Cruise Lines, 897 F.2d 377 (9th Cir. 1990), cert granted, No. 89-1647 (Oct. 2, 1990)	3, 4, 5
Constitution, statute, and rule:	
Due Process Clause, Amend. XIV	2, 3
28 U.S.C. § 1332	2
Ind. Trial Rule 4.4	3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 916 F.2d 1239 (1990). The memorandum opinion of the district court (App., *infra*, 20a-42a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1990, and a petition for rehearing was denied on November 21, 1990. App., *infra*, 43a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT

1. Petitioner is incorporated under the laws of the Cayman Islands. Petitioner operates a hotel in the Cayman Islands under a license from Holiday Inns, Inc. At times relevant to this action, petitioner had reservation offices in Miami, Florida, and Memphis, Tennessee. Petitioner, however, had no other place of business in the United States. App., *infra*, 2a.

In 1981, petitioner entered into a contract with American Trans Air (American) to provide accommodations for tours run by American to the Cayman Islands. Under that contract, the rooms in petitioner's Cayman Islands hotel were guaranteed at a reduced rate for American's tours. American, however, did not act as an agent for petitioner; American had no authority to bind petitioner and it did not purport to do so. App., *infra*, 2a-3a, 14a-15a.

2. In 1986, respondents Dorothy and Louie Wilson commenced this action against petitioner and Holiday Inns, Inc. in the United States District Court for the Southern District of Indiana. That court's jurisdiction was based on diversity of citizenship and amount in controversy, *see* 28 U.S.C. § 1332.

Respondents are citizens of the state of Illinois. App., *infra*, 13a. Respondents allege in their complaint that they participated in a tour organized by American that left Indianapolis, Indiana on October 28, 1984. App., *infra*, 3a. Respondents stayed at petitioner's hotel in the Cayman Islands. Respondents allege that, on October 30, 1984, Dorothy Wilson was assaulted

by an intruder in her hotel room. Respondents contend that Dorothy Wilson suffered serious injuries as a result of that attack. *Id.* at 3a. Respondents' complaint then sets forth 13 counts against petitioner and Holiday Inns, Inc. Those counts are based on theories of negligence, breach of contract, and negligent infliction of emotional distress. *Id.* at 3a.

3. The district court denied petitioner's motion to dismiss for lack of personal jurisdiction. App., *infra*, 41a. The court noted that Indiana's long-arm statute, Ind. Trial Rule 4.4, reaches to the limits of the Due Process Clause. *Id.* at 30a. The court then held that Indiana could constitutionally exercise jurisdiction over petitioner because it had a business relationship with an Indiana travel club and it advertised in national periodicals *Id.* at 36a. The district court certified its order for immediate review by the court of appeals.

4. A divided panel of the court of appeals affirmed. App., *infra*, 13a. The court ruled that petitioner had sufficient contacts with Indiana so that "the district court correctly determined that [petitioner] is subject to personal jurisdiction in Indiana." *Id.* at 9a. The court of appeals stated that those "contacts" were: (1) petitioner advertised in Indiana, (2) petitioner entered into a contract with an Indiana tour company, and (3) petitioner sent representatives to Indiana to negotiate that contract. In support of its holding, the court cited the Ninth Circuit's opinion in *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), cert granted, No. 89-1647 (Oct. 2, 1990).

Judge Will dissented. He observed that petitioner "had no purposeful contacts with the plaintiffs or with Indiana related to this suit, which arises from acts and events that took place entirely in the Cayman Islands." App., *infra*, 14a. He noted that petitioner "did not sell products in Indiana, and [petitioner] had no contacts whatsoever with the [respondents] in Indiana

or anywhere else in the United States." *Id.* at 15a. Judge Will contended that the majority's "forcing [petitioner] to defend this case in an Indiana courtroom is far from fair or substantially just." *Id.* at 14a.

Judge Will then discussed the implications of the majority's holding. He stated that, under the majority's reasoning, the Indiana courts may exercise jurisdiction over "any foreign hotel, restaurant, museum or other facility or service provider, which confirms reservations for U.S. travel agents and tour operators and compensates those travel agents and tour operators for arranging reservations (a frequent and typical practice)." App., *infra*, 16a. That is true even though "all the acts and events alleged" in the complaint may have "occurred in Timbuktu, Bali, Japan, Australia, Majorca, Tahiti or where-have-you." *Id.* Judge Will concluded that "[t]he kind of global long-arm jurisdiction which the majority endorses . . . both fails the minimum contacts test and is at odds with the fundamental due process requirement that jurisdiction comport with 'fair play and substantial justice.'" *Id.*

The panel denied a petition for rehearing. App., *infra*, 43a.

REASONS FOR GRANTING THE PETITION

On October 2, 1990, this Court granted certiorari in *Carnival Cruise Lines, Inc. v. Shute*, No. 89-1647 (argued Jan. 15, 1991). In that case, the plaintiff, a citizen of the forum state of Washington, seeks damages for injuries sustained in a fall on a cruise ship. The defendant is the Panamanian corporation that owns and operates the ship. The Panamanian corporation advertises in the state of Washington, has contractual relationships with Washington travel agents, and holds seminars for travel agents in Washington. 897 F.2d 377, 379 (9th Cir. 1990). Under those facts, the Ninth Circuit ruled that the state of

Washington could, consistently with due process, exercise jurisdiction over the Panamanian corporation. *Id.* at 380-87. This Court granted certiorari to review that ruling.

This Court's decision in *Carnival Cruise Lines* will likely govern the outcome of the jurisdictional issue in this case. Indeed, the Panamanian corporation's contacts with Washington are more substantial than petitioner's contacts with Indiana. See 897 F.2d at 379. Accordingly, if this Court reverses the judgment in *Carnival Cruise Lines*, it will follow *a fortiori* that the judgment in this case must be reversed. Hence, this petition should be held and disposed of in light of the Court's decision in *Carnival Cruise Lines*.

The petition for a writ of certiorari in *Carnival Cruise Lines* raises an issue in addition to the due-process question. The second question is whether a contractual provision requiring suit to be brought in Florida is enforceable. The Ninth Circuit held that it was not. 897 F.2d at 389. Thus, this Court could logically reverse the Ninth Circuit's judgment without reaching the due-process question. If that occurs, then the Court should grant plenary review in this case. The important jurisdictional issue regarding foreign corporations is necessarily presented by this petition. And for the reasons given in the petition in *Carnival Cruise Lines*, that issue deserves resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's decision in *Carnival Cruise Lines, Inc. v. Shute*, No. 89-1647.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 88-2495 & 88-2496

DOROTHY A. WILSON and LOUIS P. WILSON,

Plaintiffs-Appellees,

v.

HUMPHREYS (CAYMAN) LIMITED, a corporation, and HOLIDAY INNS, INC., a corporation,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 86-C-197 - **Larry J. McKinney**, Judge.

ARGUED OCTOBER 31, 1989 - DECIDED OCTOBER 24, 1990

Before BAUER, *Chief Judge* and RIPPLE, *Circuit Judge*, and WILL, *Senior District Judge*.*

RIPPLE, *Circuit Judge*. Dorothy and Louis Wilson initiated this diversity action in 1986. The Wilsons asserted that the two defendants involved in this appeal, together with a third defendant, were liable to them for damages in connection with a serious injury suffered by Mrs. Wilson while staying as a guest

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* The Honorable Hubert L. Will of the United States District Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

in appellant Humphreys' Hotel.[1] Humphreys and Holiday Inns moved to dismiss the complaint due to lack of subject matter and personal jurisdiction, and asserted that the forum selected by the plaintiffs violated the doctrine of *forum non conveniens*. The district court denied these motions. Upon application by the appellants, the district court certified the questions of jurisdiction and *forum non conveniens* to this court on May 25, 1988 (for Humphreys), and July 7, 1988 (for Holiday Inns). This court accepted the appeal on July 13, 1988. We now affirm the judgment of the district court in part and remand for further consideration.

I
BACKGROUND

Humphreys (Cayman) Limited is incorporated under the laws of the Cayman Islands. Humphreys is a licensee of appellant Holiday Inns, Inc. and operates a hotel in the Cayman Islands under authority of that license. Humphreys maintains a corporate office in Memphis, Tennessee and has operated a reservations office in Miami, Florida. Holiday Inns, Inc. is a Tennessee corporation and is registered to do business in Indiana. The record does not reveal the nature or extent of its activities within the state.

Since 1976, Humphreys has participated in a continuing commercial relationship with American Trans Air (American) to provide accommodations for tours run by American to the Cayman Islands. As part of this relationship, Humphreys sent officers to Indianapolis on at least one occasion to meet with representatives of American. During a trip to Indiana in the summer of 1981, Humphreys' representatives negotiated a long-term contract with American by which a certain number

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[1] One of the original defendants, American Trans Air, Inc., moved for summary judgment, which was granted by the district court on April 6, 1988. The district court entered final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and that portion of the case was appealed immediately. This court affirmed the district court's judgment regarding the air carrier in *Wilson v. American Trans Air, Inc.*, 874 F.2d 386 (7th Cir. 1989).

of rooms at Humphreys' hotel would be guaranteed at a reduced rate for American-run tours, with American tour leaders receiving free accommodations. American frequently has listed trips to the Cayman Islands in its regular advertising brochures and has included specific references to Humphreys' hotel. In addition, Humphreys advertises extensively in national magazines directed both at travel agents and potential travellers. Humphreys printed rate cards and brochures that it sent for further distribution to American in Indiana and to various travel agents around the country.

Dorothy and Louis Wilson participated in a tour organized by American that left Indianapolis International Airport on October 28, 1984. The group stayed at Humphreys' hotel in the Cayman Islands. According to Mrs. Wilson's affidavit, arrangements for the trip were made as a result of advertisements for the tour that appeared in American's travel bulletin. Arrangements were made with American's tour subsidiary, Ambassadair, and payment was made to Ambassadair in Indianapolis, Indiana.

On October 30, 1984, Mrs. Wilson was assaulted by an intruder in her hotel room. The intruder attempted to rob and rape Mrs. Wilson, and she suffered serious injuries. She spent a week in a hospital on the Cayman Islands and then returned to Indianapolis to be treated at Methodist Hospital.

The complaint contains thirteen counts against the two appellants in this case. The counts charge the appellants with negligence, breach of express and implied warranties, breach of contract, and negligent infliction of emotional distress. The appellants moved to dismiss the complaint on the grounds of lack of subject matter or personal jurisdiction, and *forum non conveniens*. The district court denied these motions, but subsequently certified them for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). We accepted the appeal and now consider each issue in turn.

II
ANALYSIS

A. *Subject Matter Jurisdiction*

Diversity jurisdiction in this suit is based on 28 U.S.C. § 1332(a)(3), which provides for jurisdiction when the suit is between "citizens of different States and in which citizens or subjects of a foreign state are additional parties." Humphreys argues that the district court cannot exercise subject matter jurisdiction over it because it is a company incorporated in the Cayman Islands, and the Cayman Islands is not a "foreign state." Humphreys reaches this conclusion by noting that the Cayman Islands is a dependency of Great Britain and that the United States does not regard the Cayman Islands as an independent sovereign. *See* The World Factbook 1989 at 56.

The power to exercise jurisdiction over a foreign citizen under 28 U.S.C. § 1332 has been referred to as "alienage jurisdiction." *Sadat v. Mertes*, 615 F.2d 1176, 1182 (7th Cir. 1980). This type of jurisdiction "was intended to provide the federal courts with a form of protective jurisdiction over matters implicating international relations where the national interest was paramount." *Id.*

> "The dominant considerations which prompted the provision for such jurisdiction appear to have been:
>
> (1) Failure on the part of individual states to give protection to foreigners under treaties; . . . [and]
>
> (2) Apprehension of entanglements with other sovereigns that might ensue from failure to treat the legal controversies of aliens on a national level."

Id. (quoting *Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496, 500 (S.D.N.Y. 1955).

Our inquiry therefore must be whether the policies supporting alienage jurisdiction permit a United States District Court to assume jurisdiction over a citizen of the Cayman Islands.[2] The

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[2] Corporations are considered citizens of the country in which they are incorporated. *National Steamship Co. v. Tugman*, 106 U.S. (16 Otto) 118, 120-21 (1882), *Panalpina Welttransport GMBH v. Geosource, Inc.*, 764 F.2d 352, 354 (5th Cir. 1985).

Cayman Islands is a British Dependent Territory.[3] A citizen of a British Dependent Territory is a "citizen of the United Kingdom and Colonies." British Nationality Act 1981 § 51(3)(a)(ii). According to an affidavit of a Cayman Islands attorney submitted by Humphreys, the court system in the Cayman Islands is patterned after that of Great Britain. In addition, "[t]he Common Law of England . . . is recognised and applied by the Courts in all cases where there has not been a specific local enactment." Humphreys' App. at 66. The Cayman Islands is administered by a governor who is appointed by the British monarch. The United Kingdom represents Caymanian diplomatic interests and is responsible for its military defense. The World Factbook 1989 at 56.

Several federal courts have determined, although generally without discussion, that subject matter jurisdiction existed in suits between citizens of the United States and Cayman Island corporations. *See Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 399-400 (7th Cir. 1986); *Philan Ins. Ltd. v. Frank B. Hall & Co., Inc.*, 712 F. Supp. 339, 345 (S.D.N.Y. 1989); *Rolls Royce (Canada) Ltd. v. Cayman Airways, Ltd.*, 617 F. Supp. 17, 18 (S.D. Fla. 1985). In addition, the Second Circuit concluded that alienage jurisdiction existed over a company incorporated in Bermuda, also a British Dependent Territory. *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731, 735 (2d Cir. 1983); *see also* British Nationality Act 1981, 31 Halsbury's Statutes 172 (4th ed. 1987) (Bermuda identified as a British Dependent Territory).

Humphreys relies on one unpublished district court decision for support of its assertion that alienage jurisdiction does not apply to this case. *St. Germain v. West Bay Leasing, Ltd.*, CV-81-3945, order (E.D.N.Y. 1982). That court in fact did conclude that subject matter jurisdiction was lacking when one of the parties was a Cayman Islands corporation. The court relied in part on an earlier decision denying diversity jurisdiction over a business incorporated in Hong Kong, a British

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[3] British Nationality Act 1981, 31 Halsbury's Statutes 172 (4th ed. 1987).

colony. *Windert Watch Co. v. Remex Elecs. Ltd.*, 468 F. Supp. 1242 (S.D.N.Y. 1979). However, the force of the *Windert* decision has been eroded by a more recent case from the same court. In *Tetra Finance (HK) Ltd. v. Shaheen*, 584 F. Supp. 847 (S.D.N.Y. 1984), the court noted that corporations should not be denied access to American courts simply because of the status of the country in which they are incorporated. "It would seem hypertechnical to preclude Hong Kong corporations from asserting claims in our courts simply because Hong Kong has not been formally recognized by the United States as a foreign sovereign in its own right." *Id.* at 848.[4]

We agree with the district court that subject matter jurisdiction under section 1332 is present. We see no reason to depart from the weight of authority. Certainly, the exercise of American judicial authority over the citizens of a British Dependent Territory implicates this country's relationship with the United Kingdom-precisely the raison d'etre for applying alienage jurisdiction. Not applying alienage jurisdiction in this case would allow "form rather than substance" to govern. *Murarka v. Bachrack Bros.*, 215 F.2d 547, 552 (2d Cir. 1954) (Harlan, J.).[5]

B. *Personal Jurisdiction*

In a diversity case, a federal district court has personal jurisdiction over a nonresident defendant "only if a court of the state in which it sits would have such jurisdiction." *Turnock v. Cope*, 816 F.2d 332, 334 (7th Cir. 1987). Therefore, review of

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[4] *Windert* also was rejected by Judge Kocoras in *Creative Distributors, Ltd. v. Sari Niketan, Inc.*, Mem. op., 1989 U.S. Dist. LEXIS 10436 at *4 (N.D. Ill. 1989) (finding the reasoning of *Tetra Finance* persuasive), and Judge Luongo in *Timco Eng'g, Inc. v. Rex & Co.*, 603 F. Supp. 925, 930 n.8 (E.D. Pa. 1985) (same).

[5] In *Murarka v. Bachrack Bros., Inc.*, 215 F.2d 547 (2d Cir. 1954), the plaintiff was a citizen of India who filed his suit while India was still a British colony. The defendant claimed that, because India was not a sovereign nation when the complaint was filed, the court did not have alienage jurisdiction. Then-Judge Harlan determined that the district court did have jurisdiction, because the United States had granted *de facto* recognition of India by accepting an ambassador from that country. *Id.* at 552.

decisions regarding jurisdiction of a federal court in a diversity suit requires a two-part inquiry: (1) whether the state statute allows jurisdiction, and (2) whether the assertion of jurisdiction complies with constitutional due process standards. *See Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276, 279 (7th Cir. 1990); *John Walker & Sons, Ltd. v. DeMert & Dougherty, Inc.*, 821 F.2d 399, 401-02 (7th Cir. 1987) (Illinois long-arm statute); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1069 at 347 (1987). In this case, these twin inquiries collapse into one, because, as this court has noted, Indiana's long-arm statute extends personal jurisdiction to the limit allowed under the due process clause of the fourteenth amendment. *Wallace v. Herron*, 778 F.2d 391, 393 (7th Cir. 1985) (and cases cited therein), *cert. denied*, 475 U.S. 1122 (1986). Accordingly, we shall focus on whether assertion of jurisdiction in this case violates due process.

Due process requires that the defendant have "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *FMC Corp. v. Varonos*, 892 F.2d 1308, 1313 (7th Cir. 1990). The minimum contacts must be established by the purposeful acts of the defendant. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Examples of acts that, depending on the circumstances, might support a determination of jurisdiction include "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

There are two types of jurisdiction that can be exercised over an out-of-state defendant-specific and general. When the defendant's activities in the state with respect to the transaction underlying the litigation serve as the basis for jurisdiction, the assertion of jurisdiction is said to be "specific." *See Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 n.8

(1984); *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 666 n.3 (7th Cir. 1986) (discussing difference between general and specific jurisdiction), *cert. denied*, 479 U.S. 1092 (1987); *Wallace*, 778 F.2d at 393 (same). By contrast, when the defendant's overall activity in the state, not simply its actions with respect to the underlying transaction, are the basis, the jurisdiction is said to be "general." *See Helicopteros Nacionales de Colombia*, 446 U.S. at 414 n.9.

1. specific jurisdiction over Humphreys

Considering Humphreys first, we shall examine whether the contacts it had with the state satisfy the assertion of specific jurisdiction.[6] Jurisdiction based on such contacts comports with due process only if Humphreys reasonably should have anticipated being haled into court in Indiana. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *FMC Corp. v. Varonos*, 892 F.2d 1308, 1313 (7th Cir. 1990); *Wallace*, 778 F.2d at 393-94. Humphreys must purposefully have availed itself of the "'privilege of conducting activities'" in Indiana. *Burger King*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); *see also Giotis*, 800 F.2d at 666; *Wallace*, 778 F.2d at 395.

"Specific jurisdiction turns on a particularized assessment of the 'relationship among the defendant, the forum, and the litigation.'" *Saylor v. Dyniewski*, 836 F.2d 341, 344 (7th Cir. 1988) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). The conduct engaged in by Humphreys in Indiana is certainly sufficient to satisfy specific jurisdiction. Humphreys advertised in the state of Indiana, entered into a long-term arrangement with an Indiana corporation to provide a guaranteed number of rooms to be used in connection with tour packages that departed from Indiana, and sent representatives to Indiana to negotiate the contract. In short, Humphreys established a continuing

[6] It is not argued that Humphreys' business in Indiana constitutes "the kind of continuous and systematic general business contacts," *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416 (1984), necessary for general jurisdiction.

commercial relationship with an Indiana tour company with the expectation that its service (providing accommodation) would be purchased by residents of Indiana (and other states). These contacts convince us that the district court correctly determined that Humphreys is subject to personal jurisdiction in Indiana. Humphreys, by its own business conduct, had purposefully availed itself "of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). It should have "reasonably anticipate[d] being haled into court there." *World-Wide Volkswagen v. Woodson*, 444 U.S. at 297; *see Shute v. Carnival Cruise Lines*, 897 F.2d 377, 380, 386 (9th Cir. 1990) (in plaintiff's personal injury suit, specific jurisdiction over corporation was found where corporation advertised in forum, sent brochures to forum, solicited business in forum, and sold tickets on a commission basis through travel agents in forum) (as amended and refiled); *Rainbow Travel Serv., Inc. v. Hilton Hotels Corp.*, 896 F.2d 1233, 1238 (10th Cir. 1990) (contacts sufficient to meet due process requirements when hotel solicited business in forum state, carried out negotiations there, and sent contracts there for execution); *Neiman v. Rudolf Wolff & Co.*, 619 F.2d 1189, 1193 (7th Cir.) (personal jurisdiction established where employee of defendant [an English company] came to forum for a lunch meeting, and meeting constituted bulk of negotiations that led to formation of contract; "A defendant's participation in the state in substantial preliminary negotiations leading to the contract in issue has been held a sufficient basis for long-arm jurisdiction."), *cert. denied*, 449 U.S. 920 (1980).[7]

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[7] The *Neiman* court also noted that convenience for the parties is a factor that is often considered as part of a due process minimum contacts analysis. In that case, the fact that the defendant was an English company and that litigation in Illinois might have been inconvenient was not dispositive, for "it would also be inconvenient for plaintiff to sue overseas." 619 F.2d at 1195 n.8. Because of the "purposeful acts" in the forum, the inconvenience did not amount to denial of due process. *Id.*

2. general jurisdiction over Holiday Inns

On this record, personal jurisdiction over Holiday Inns must be based, if at all, on general jurisdiction, because the only connection Holiday Inns had with the injury was its franchise arrangement with Humphreys. Jurisdiction based on a party's generally affiliating nexus with the state, as previously noted, does not offend due process when there are "continuous and systematic general business contacts" of the defendant in the state. *Helicopteros Nacionales de Columbia*, 466 U.S. at 416. "This is a fairly high standard in practice." *Fields v. Sedgwick Associated Risks Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986); *see Shute*, 897 F.2d at 380-81 (collecting cases). The Wilsons argue that the Indiana registration act, Indiana Code 23-1-11-6,[8] is sufficient to support general jurisdiction. Registering to do business is a necessary precursor to engaging in business activities in the forum state. However, it can not satisfy . . . standing alone . . . the demands of due process. Such an interpretation of the Indiana registration statute would render it constitutionally suspect and, accordingly, we decline to give it such a reading. *Cf. NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490, 500 (1979).

On this record, we cannot determine whether Holiday Inns had a sufficient level of conduct and activity in Indiana to justify the characterization "continuous and systematic." *Helicopteros Nacionales de Colombia*, 466 U.S. at 416. Accordingly, we remand this aspect of the case to the district court for a more plenary inquiry into the contacts and conduct of Holiday Inns in Indiana.

C. *Forum Non Conveniens*

We review under an abuse of discretion standard the district court's decision to deny a motion to dismiss for *forum non conveniens*. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981); *FMC Corp. v. Varonos*, 892 F.2d 1308, 1314 (7th Cir. 1990). As the Supreme Court has instructed,

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[8] This section was repealed in 1986 and superceded by the foreign corporations chapter of the Indiana Code, sections 23-1-49-1 to -10.

> [W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Piper Aircraft Co., 454 U.S. at 257. Furthermore, the district court is granted "substantial flexibility" in deciding a *forum non conveniens* argument. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988).

"There is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Macedo v. Boeing Co.*, 693 F.2d 683, 688 (7th Cir. 1982); *see Piper Aircraft Co.*, 454 U.S. at 255; *Koster v. (American) Lumbermens Mutual Casualty*, 330 U.S. 518, 524 (1947); *Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1947). "Courts routinely give less weight to a foreign plaintiff's choice of forum. Citizens or residents deserve somewhat more deference than foreign plaintiffs." *Macedo*, 693 F.2d at 688; *see Piper Aircraft*, 454 U.S. at 256. Nevertheless, the district court must be able to police misuse, such as actions brought in a particular forum to harass a party. There is no rigid test upon which a district court must focus when analyzing a *forum non conveniens* argument; instead, as articulated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, there are several public and private interest factors that may be considered.[9] Private interests include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also

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[9] The Supreme Court never has ruled whether the criteria governing the *forum non conveniens* decision are governed by federal or state law under the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981). Because the parties appear to agree that federal and Indiana criteria are the same, we need not decide the matter. Humphreys' Br. at 24.

> be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial.

330 U.S. at 508. Public interests include judicial administration, trying cases in a forum that has a relation to the litigation, and having matters of state law decided by a court sitting in that state. *Id.* at 508-09.

In this case, the district court relied exclusively on the reasoning found in *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). We recognize, as did the district court, the substantial similarity between the forum-related factors present in this suit and those present in the *Lehman* suit. As is apparent from the case name, *Lehman* involves the same Cayman Islands hotel as is involved here. Similarly, the injury occurred on the Cayman Islands to a United States resident who responded to a Humphreys' advertisement in the United States. The Eighth Circuit evaluated many of the *Gilbert* factors. The court first determined that the location of witnesses in the Cayman Islands did not militate strongly for applying *forum non conveniens*, because many of the witnesses were Holiday Inns employees (thus enabling Humphreys to obtain their cooperation in travelling to testify), and other modes of obtaining the evidence-such as admissions and depositions-could be used. *Lehman*, 713 F.2d at 343. The court also concluded that Iowa and the United States had an interest in the suit because the injured party was an Iowa resident and had made the travel arrangements in Iowa. *Id.* at 344. The Eighth Circuit placed some weight on the fact that the procedures for litigating in the Cayman Islands would disadvantage the plaintiff. Attorneys there do not accept work for contingent fee arrangements; it is likely that the plaintiff could not receive a jury trial for her injury action; and she would have been required to post a $1,000 bond with the court because she was a foreigner. Id. at 345-46. Accordingly, the Eighth Circuit determined that the district court abused its discretion in dismissing the action on the ground of *forum non conveniens*. Id. at 347.

We cannot say that the district court abused its discretion in declining to dismiss the suit. Great weight must be given the

Wilsons' choice of forum. The inconvenience for Humphreys of litigating the case in Indiana must be balanced against the disadvantageous procedures available in the Cayman Islands for the Wilsons,[10] the interest of Indiana in providing a remedy for an injury stemming from a tour booked in Indiana for a group that left from Indiana, and the hardships that the Wilsons would encounter in litigating a case at such a great distance from their home. For these reasons, we conclude that the district court did not abuse its discretion in denying the *forum non conveniens* motion.

Conclusion

For the foregoing reasons, we affirm the orders of the district court regarding Humphreys, but remand to the district court for further consideration on whether Holiday Inns has subjected itself to general jurisdiction in Indiana.

AFFIRMED IN PART AND REMANDED

WILL, *Senior District Judge*, concurring in part and dissenting in part. I concur in the remand as to Holiday Inns. I dissent, however, from the assertion of "specific" jurisdiction over Humphreys and from the majority's affirmance that Indiana is a proper forum.

The Wilsons are residents of Illinois. Their trip to the Caymans was a gift from their son. He planned it and paid for it. Neither the son nor the Wilsons had any contacts with Humphreys, in Indiana or anywhere else in the United States. He booked the trip through American, and there is no evidence that he was influenced in any way by anything Humphreys said or did, that he selected Humphreys or even knew that it was to be the hotel. In fact, the record is clear, as the majority recognizes, that "arrangements for the trip were made as a result of

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[10] We recognize that, to the extent these disadvantages are grounded in differences in the substantive law of the Cayman Islands, they may be given some, but not substantial or conclusive, weight. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981); *Macedo v. Boeing Co.*, 693 F.2d 683, 688 (7th Cir. 1982).

advertisements for the tour that appeared in American's travel bulletin. Arrangements were made with American's tour subsidiary, Ambassadair, and payment was made to Ambassadair . . . ." Majority op. at 3.

I. Personal Jurisdiction

Jurisdiction over an unwilling, non-resident defendant conforms to the requirements of due process only if the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). A defendant who has "purposefully established 'minimum contacts' in the forum State" has impliedly submitted to jurisdiction in the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). But merely "'random,' 'fortuitous,' or 'attenuated'" contacts with a forum are not enough. *Id.* at 475. Further, any "assertion of personal jurisdiction [must] comport with 'fair play and substantial justice.'" *Id.* at 476, quoting *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). And, finally, in the special case of "specific" jurisdiction, a defendant's contacts with the forum serve as a basis for personal jurisdiction only for suits "arising out of or related to" those contacts. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.8 (1984).

Humphreys here had no purposeful contacts with the plaintiffs or with Indiana related to this suit, which arises from acts and events that took place entirely in the Cayman Islands. Humphreys could not reasonably have anticipated being haled into court in Indiana, and forcing Humphreys to defend this case in an Indiana courtroom is far from fair or substantially just.

Any and all contacts with the Wilsons' son in Indiana related to this lawsuit were American's, not Humphreys', and American admittedly did not act as Humphreys' agent. American had no authority to confirm reservations and bind

Humphreys and it did not purport to do so. American had to submit all reservations to Humphreys for confirmation.[1]

I can understand how Humphreys could reasonably have expected to be haled into an Indiana court, state or federal, to resolve a dispute arising from its contract with American Trans Air, which contract was negotiated in Indiana, or if it had sold products in Indiana. But this case arises from a dispute between Humphreys and the Wilsons, not Humphreys and American. Humphreys did not sell products in Indiana, and Humphreys had no contacts whatsoever with the Wilsons in Indiana or anywhere else in the United States.

The majority's suggestion that Indiana courts have jurisdiction here because "Humphreys established a continuing commercial relationship with an Indiana tour company with the expectations that its services would be purchased by residents of Indiana (and other states)," majority op. at 9, and "Humphreys reasonably should have anticipated being haled into court in Indiana," *id.* at 8, strikes me as wholly inconsistent with the facts as well as the requirements of due process.

Humphreys undoubtedly serves hundreds or even thousands of U.S. tourist guests each year as the result of reservations made by American and other U.S. tour operators and travel agencies. Every U.S. tour organizer or travel agency has innumerable foreign hotels, bus lines, guide services, etc., with which it maintains continuing commercial arrangements. It would be surprising, however, if Humphreys or any other foreign service

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[1] See *Fordyce v. Round Hill Developments, Ltd.*, 585 F.2d 30 (2d Cir. 1978) (Jamaican hotel did not subject itself to jurisdiction of New York courts by contracting with a travel agent, where the travel agent was an independent contractor which leased rooms from the hotel at its own risk); *Kopolowitz v. Deepdene Hotel & Tennis Club*, 464 F. Supp. 677 (S.D.N.Y. 1979) (Bermuda hotel did not submit to jurisdiction of New York courts by engaging a sales representative to promote the hotel and handle inquiries and requests for reservations, in New York and elsewhere in the United States, where the sales representative did not have the power to confirm reservations). Compare *Gelfand v. Tanner Motors Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967) (involving a nonforum defendant whose agent in New York had power to confirm reservations).

provider anticipated that, merely as a result of its contacts with U.S. travel agents and without more, it might wind up defending lawsuits brought by its U.S. guests in U.S. courts.

To hold, as the majority does today, that Indiana courts may properly exercise in personam jurisdiction over Humphreys is to hold that any foreign hotel, restaurant, museum or other facility or service provider, which confirms reservations for U.S. travel agents and tour operators and compensates those travel agents and tour operators for arranging reservations (a frequent and typical practice), is subject to the jurisdiction of U.S. courts and should expect to be haled into them to defend tort suits or any other claims brought by U.S. guests. This, notwithstanding that the hotel or other service provider has had no dealings with the guest in any U.S. forum, that there was no principal/agent relationship between it and the travel agent or tour operator with whom the guest solely dealt, and even though all the acts and events alleged in the guest's complaint occurred in Timbuktu, Bali, Japan, Australia, Majorca, Tahiti or where-have-you, where, in addition, all the witnesses and relevant records are located.

The kind of global long-arm jurisdiction which the majority endorses, in my opinion, both fails the minimum contacts test and is at odds with the fundamental due process requirement that jurisdiction comport with "fair play and substantial justice." I believe that compelling Humphreys to litigate in Indiana is unanticipated, unfair and beyond the bounds of due process. Cf. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.").

II. *Forum Non Conveniens*

In addition to holding that Indiana's long-arm statute reaches Humphreys, the majority also finds, as did the Eighth Circuit, in *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339 (8th Cir. 1983), that the fact that the hotel and all the witnesses are located in the Cayman Island, where all the events giving rise to this

case took place, is outweighed by other considerations such as the allegedly limited availability of contingent fee arrangements and jury trials in the Cayman Islands, the necessity of a bond, the plaintiffs prerogative to choose their forum, and the hardship for the plaintiffs of litigating in the Cayman Islands (where their alleged cause of action arose). I respectfully disagree.

There are a number of serious problems with trying this case in Indiana. First, the site of the alleged tort, the defendant, all the witnesses other than the plaintiffs and all the records are in the Cayman Islands. The inconvenience to Humphreys far outweighs any inconvenience to the Wilsons to try the case where it arose.

Second, Indiana citizens undoubtedly have an interest in a convenient home forum. And, if due process permits, Indiana may have an interest in providing such a forum for its citizens who choose to litigate there. But it is difficult to conceive of what real interest either Indiana or its citizens have in this case. The Wilsons are citizens of *Illinois*. In *Lehman*, by contrast, the plaintiffs were, at least, citizens of the forum state.

Third, while it would undoubtedly be to the Wilsons' advantage to try this case under Indiana law (and before an Indiana jury)-which is, presumably, why they chose to file it there-the differences the parties have identified between Indiana law and the law of the Cayman Islands are not in themselves a justification either for Indiana courts to assert due process long-arm jurisdiction or for finding that the balance of inconvenience in this case favors an Indiana trial. Both the majority and the district court have given too much weight to these differences. "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981) (availability of strict liability in Pennsylvania but not in Scotland did not, by itself, bar dismissal for *forum non conveniens*). See also *id.* at 252 n.19.

I would note, in addition, that although the Wilsons have apparently been assuming that in Indiana, local law would apply, that may or may not be true. Although the majority does not discuss the issue, it is an important conflict of laws question,

and possibly a difficult one, whether Cayman Islands or Indiana law should govern at trial. See *Piper Aircraft*, 454 U.S. at 251 ("The doctrine of *forum non conveniens* . . . is designed in part to help courts avoid conducting complex exercises in comparative law."). The answer to that question, which depends on Indiana's choice-of-law rules, may determine not only the applicable law of liability and the right to a jury but also Mr. Wilson's right to sue. If the majority is holding, as it seems to suggest by referring to trial by jury, not only that Indiana courts have jurisdiction but also that Indiana substantive law applies, then I believe the opinion ought not to assume it, but should say so and explain why.

A fourth problem with allowing this case to proceed in Indiana is that it is likewise unclear and troubling to me how an Indiana judgment against Humphreys, should that be the outcome, would be enforced-an issue which, again, the majority's opinion overlooks. I would certainly hope that Humphreys, desiring to continue to attract U.S. tourists, would recognize and respond to any judgment that might be entered against it. But asserting jurisdiction over and entering judgments against foreign entities, many of whom have no assets in the United States, is at best a speculative practice.

III. Conclusion

It is worth noting the probable consequences of the majority's decision. Many Americans are frequent foreign travelers. If U.S. courts have jurisdiction every time an American tourist has a dispute with a foreign service provider which has an ongoing contact with an American tour organizer or travel agent, we are going to see a lot more lawsuits such as this one, and foreign service providers will likely protect themselves from their increased exposure by charging higher rates and/or insisting on exculpatory provisions in their contracts with Americans.

I recognize that finding no U.S. jurisdiction in cases like this might require American travelers like Mrs. Wilson to return to places where they have had traumatic experiences in order to

pursue remedies for alleged wrongs. Those are not considerations, however, that are relevant to jurisdiction, which can only be stretched so far as due process allows and has, I believe, been stretched far too far in this case.

It is undisputed that U.S. tourists traveling voluntarily in foreign countries are subject to the laws and jurisdiction of the courts of those countries. Consistent with that principle, the long-arm jurisdiction of the fifty states cannot be applied globally so as to give U.S. courts specific jurisdiction over foreign defendants in tort cases arising from events that took place entirely on foreign soil and are unrelated to the defendants' contacts with any U.S. forum.

Believing that the bounds of due process have been far exceeded in this case, I would reverse the finding of jurisdiction as to Humphreys. I believe, in addition, that denying Humphreys' motion for a dismissal for *forum non conveniens* constituted an abuse of discretion and would also reverse on that basis, even if Humphreys' contacts with Indiana satisfied due process. I concur, however, with the majority's conclusions as to Holiday Inns.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DOROTHY A. WILSON and LOUIE P. WILSON,	)	
Plaintiffs,	)	
v.	)	CAUSE NO. IP 86-197-C
HOLIDAY INNS, INC., HUMPHREYS (CAYMAN), LTD. and AMERICAN TRANS AIR, INC.,	)	
Defendants.	)	

ENTRY

This case now pends before the Court on dispositive motions filed by the defendants. Humphreys (Cayman) Ltd. and Holiday Inns, Inc. have filed motions to dismiss the complaint on grounds of lack of personal jurisdiction and on grounds of forum non conveniens. Defendant American Trans Air, Inc. has filed a motion for summary judgment addressed to those aspects of plaintiffs' complaint alleging that it has breached a duty to the plaintiffs.

Plaintiffs in their motion in opposition to the motions of Humphreys (Cayman) Ltd. and Holidays Inns, Inc. have set out the facts upon which they rely in their opposition to the defendants' motions.

The Court for purposes of all pending motions will adopt the plaintiffs' statement of the facts as true.

STATEMENT OF FACTS

Humphreys (Cayman) Ltd. is incorporated under the laws of the Cayman Islands, having its principal place of business in Georgetown, Grand Cayman, Cayman Islands, British West Indies. Humphreys maintain a corporate office and U.S. reservations office in Memphis, Tennessee, where many of its business records concerning the hotel are maintained, and has maintained a reservations office in Miami, Florida. Humphreys is a licensee of Holiday Inns, Inc. under a license agreement dated November 23, 1970, and the motel operated by Humphreys in the Cayman Islands is operated as a Holiday Inn under that license agreement. (Verified statement of D. Glynne Owen, filed May 9, 1986; Holiday Inns' answers to interrogatories 1 and 2.) Holiday Inns, Inc. is a Tennessee corporation registered to do business in Indiana. (Par. 3, Holiday Inns' answer to Complaint.) Since at least 1976, Humphreys has entered into arrangements with American Trans Air (American) to provide accommodations for tours offered by American. (American's answer to interrogatory 1.) American is incorporated under the laws of the State of Indiana, and has its principle place of business in the State of Indiana. (Par. 5, American's answer to Complaint.)

Ambassadair Travel Club, Inc., a subsidiary of American (See Ambassadair Newsletter, September, 1984, General Information) publishes a monthly newsletter which is distributed to each member of Ambassadair. The tour by Ambassadair scheduled for the Cayman Islands at which accommodations were offered at Humphreys and in which plaintiffs participated was advertised in the newsletters.

Reservations with Humphreys are made by both telephone and correspondence between American or Ambassadair in Indianapolis, Indiana and Humphreys in Memphis, Tennessee. Payments for accommodations are sometimes mailed from Indianapolis to Humphreys' office in Memphis and sometimes paid to Humphreys at the hotel. (Richards deposition, pp. 43-48.)

Officers of Humphreys have come to Indianapolis to meet with representatives of American on several occasions for the purpose of transacting general business between the parties. Contracts between American and Humphreys are negotiated periodically, usually a year in advance. The negotiated contracts, which appear to be at least partially oral, include negotiated rates, guaranteed room availability, minimum numbers of guests for Humphreys, commission rates payable to American or net rates for rooms to be charged to American, and free accommodations available to American's personnel accompanying the tour. (American's answer to interrogatory 3; Richards deposition pp. 31-33, 37-40; Humphreys' answer to interrogatory 7.) Copies of the monthly newsletters produced by American in response to plaintiffs' request for documents show that since 1978, advertisements for 131 tours specifically offering accommodations at Humphreys' Holiday Inn have been published, and tours to the Cayman Islands are now offered by American as frequently as two or three times a month (Richards deposition, p. 40). In addition to including specific advertisements of Humphreys' Holiday Inn in the tour listing, additional advertisements are published in the bulletins for the Cayman Islands tours which include solicitation of accommodations at Humphreys' hotel.

American obtains information for the advertisements of the Holiday Inn operated by Humphreys from brochures furnished by Humphreys. While Humphreys has not specifically requested these advertisements, they are done with Humphreys' knowledge and encouragement. (Richards deposition, pp. 41, 55-6; Humphreys' answers to interrogatory 4 and 3(b)(ii).)

Humphreys advertises and publicizes its hotel through advertisements in national magazines, such as Travel Agent and Travel Weekly, Bride's Magazine and Skin Diver, as well as in various directories such as the Holiday Inn directory, the Holiday Travel Index and similar directories. In addition, Humphreys mails brochures, rate cards and other promotional materials to travel

agents generally, and has mailed such material to American and Ambassadair, knowing that they would be circulated to Ambassadair's membership. Humphreys' concedes that "it is probable that some or all of these advertisements, listings and related materials were sent or made available to persons or entities in Indiana". (Humphreys' answer to interrogatory 4.)

Humphreys also advertises in newspapers, some of which, such as the Chicago Tribune, Humphreys concedes "were probably seen in Indiana by Indiana subscribers to those newspapers". (Humphreys' answer to interrogatory 4.) Humphreys also maintains nationwide toll free numbers to be used by residents of Indiana and other states for the purpose of making reservations. All of these promotional activities are done purposefully by Humphreys to obtain business for its hotel. "Through its advertising and promotional activities, Humphreys obviously encourages the intermediaries to place reservations on their own behalf or on behalf of their clients with Humphreys' hotel." (Humphreys' answer to interrogatory 3(b)(ii).)

Humphreys' promotional activities directed to the Indiana market have certainly been successful. Records produced by Humphreys include checks issued by Ambassadair between December 21, 1982 and March 25, 1986, totalling $239,810.76.

The plaintiffs were participants in the American tour to the Cayman Islands from October 28 through November 4, 1984. The tour was advertised in the September, 1984 Newsletter. Both the tour listing and the advertisement for the Cayman Island trip included references to accommodations at the Holiday Inn.

Plaintiffs' reservations at Humphreys were made through American at Indianapolis, plaintiffs paid Ambassadair at Indianapolis for the accommodations at Humphreys and plaintiffs embarked on their tour at Indianapolis International Airport. Dorothy Wilson was attacked in her room at the hotel operated by Humphreys on the second day after her arrival. After spending a week in the hospital on the Cayman Islands she returned to

Indianapolis and received additional medical treatment at Methodist Hospital.

In addition to those facts plaintiffs' affidavit of October 9, 1986 will be taken as true for the purposes of the pending motions. That affidavit alleges that the plaintiffs were residents of Illinois. It avers further that plaintiffs received an advertisement for a Cayman Islands tour in the September, 1984, Ambassadair travel club bulletin. The Wilsons then made arrangements through Ambassadair to stay at the Holiday Inn in the Cayman Islands operated under license by Humphreys (Cayman) Ltd. Plaintiffs urge that American Trans Air, Inc. is a tour operator and as such owed a duty to its patrons to investigate proposed accommodations for safety and to warn the plaintiffs of any dangerous conditions discovered from such an investigation. This duty, according to plaintiffs, sounds both in tort and contract. The tort duty requires American to reasonably inspect facilities and warn of any dangerous conditions that might affect guests. The contract duty arising under the contract between the tour operator and the patron gives the defendant airline duties of an innkeeper to the plaintiffs.

There are several cases from across the United States that deal with the issue of a travel agent's liability for injury to its patrons while on a tour it sold or arranged. See Annotation, Liability of Travel Agents for Injuries on Tour, 53 A.L.R. 3d 1310 (1973 and supplement 1987). These cases generally illustrate a trend refusing to impose liability on travel agents for injuries to patrons regardless of the theories advanced by the plaintiffs, the injured patrons. Plaintiffs rely on exceptions to this general trend.

Plaintiffs cite both Stevenson v. Four Winds Travel, Inc., 462 F.2d 899 (5th Cir. 1972) and Taylor v. Costa Lines, Inc., 441 F.Supp. 783 (E.D.Pa. 1977) for the proposition that tour organizers have a duty to warn tour participants of dangerous conditions they might encounter during the tour. The Stevenson case recognizes that under the law of the state of Florida the duty of a travel agency to warn tour guests of conditions during the tour might arise by

reason of a contractual relationship between the travel agency and the patron. The terms of that contractual relationship would be found in representations and statements made to the tour guest in the brochure prepared by the travel agency. In the Stevenson case, the Four Winds Travel, Inc. brochure contained phrases from which reasonable individuals could conclude that Four Winds was accepting responsibility for accidents to its patrons. Four Winds put in its brochure statements regarding its tour escorts and directors having been carefully selected and trained, that these escorts were experienced and indicating the many services these tour escorts or directors would render to members of their tours. Reasonable individuals might conclude that the plaintiff in Stevenson had the right to expect that the defendant would warn her of any danger involved in a tour.

The Taylor v. Costa Lines, Inc., supra, case involved the relationship of an off-ship tour guide to the owners of a cruise ship. Any liability for defendant cruise ship was contractual and arose from oral statements and written representations of the cruise ship employees. Plaintiffs alleged that defendant made statements regarding the quality of the tour guides. Reasonable individuals might conclude on the basis of these representations that plaintiff should have been warned of dangers.

Plaintiffs direct our attention to the contractual language in the instant case upon which they rely in arguing that the Airlines owed them a duty to warn of safety problems at the hotel. The brochure in the case at hand contains the representations made to the plaintiffs by the defendant Airline regarding its responsibility. The pertinent paragraph reads as follows:

> "This tour program is planned and operated by American Trans Air, Inc., 2141 South Highschool Road, Indianapolis, Indiana, 46251, as principle and tour operator. Ambassadair Travel Club is wholly owned by Ambassadair Travel Club, Inc., an Indiana corporation which is a subsidiary of American Trans Air, Inc. American Trans Air is responsible for making all

> arrangements for transportation, provided that in the absence of negligence on the part of American Trans Air, the responsibility does not extend to any assumption of liability for any personal injury or property damage arising out of or caused by any negligent act on the part of any hotel, other air carrier or anyone rendering any of the services or accommodations being offered in connection with this public charter." [Our emphasis.]

There are no other statements or representations in the brochure or anywhere else allegedly received by the plaintiffs in this case. This paragraph is the only language relied upon by plaintiffs to establish a duty. This paragraph in the view of this Court rather than establishing a duty is a clear disclaimer by American of any duty to plaintiffs in this case once plaintiffs have deplaned. Therefore, unless this paragraph is ineffective for some public policy reason the lack of duty of American Trans Air to plaintiffs for the accident in question is apparent.

Plaintiffs point out that the entire relationship between the plaintiffs and American Trans Air, Inc. arose out of the contract between them by which the plaintiffs became members of the tour. Plaintiffs cite the above quoted portion of the brochure in support of their own view that American Trans Air, Inc. was a principal and tour operator. Plaintiffs further cite Requirements Applicable to Public Charter Operators, 14 C.F.R. 380.32(x)(1987), which provides in part:

> "Contracts between charter operators and charter participants shall state:...(x) that the charter operator is the principal and is responsible to participants for all services and accommodations offered in connection with the charter..."

Plaintiffs urge that this quotation coupled with the above cited paragraph from the brochure indicate defendant's affirmative duty to the plaintiffs.

Defendant, however, points out the remaining portion of the C.F.R. citation as follows:

> "However, the contract may expressly provide that the charter operator, unless he is negligent, is not responsible for personal injury or property damage caused by any direct air carrier, hotel or other supplier of services in connection with the charter." Id.

Certainly, the paragraph quoted from the brochure indicates American Trans Air's recognition of this permissible language and implements that permissible language in its notice to the patron that American Trans Air is not responsible for any personal injury or property damage arising out of or caused by any negligent act on the part of any hotel.

The case of Connolly v. Samuelson, 671 F.Supp. 1312 (D.Kan. 1987) dealt with many of the same issues as those presently before the Court. The court therein, after reviewing current trends and citing cases from across the country, concluded that the majority of cases refused to impose liability on travel agents for injuries suffered by tourists while on the tours sold to them by the travel agencies. The Connolly case additionally dealt with an exculpatory clause from the defendant Samuelson's brochure. That clause, similar to the one contained in the brochure in the instant case, indicated that the travel agency would "assume no liability for injury, damage, loss, accident, delay or irregularity... for any reason whatsoever". The Connolly court therefore found against the plaintiff and in favor of the travel agent for two reasons: 1) the travel agent had no duty, and, 2) even if a duty could be found the exculpatory clause in the brochure would have relieved the travel agent of discharging that duty. No distinction was made in the Connolly case between a travel agent and travel agencies. There seems to be no reason to treat agents and agencies differently in terms of duty. Applicability of the Connolly case to the case at bar seems factually compelling.

The case of Lavine v. General Mills, Inc., 519 F.Supp. 332 (N.D. Ga. 1981) also dealt with this same issue. The travel agency in that case had a similar clause in its brochure showing that they

undertook no warranty or contractual guarantee of plaintiff's safety on the cruise. The Lavine case cites the case of Raskin v. Ulysses Lines, Ltd., No. Civ. 4275 (HFW)(S.D.N.Y. Sept. 10, 1980) as support for its finding. In the Raskin case the plaintiff sought to recover for injuries she suffered while a ship passenger. It appears that the plaintiff fell and was injured aboard a ship while it was docked in Rumania. That plaintiff sued the ship's owner and operator and also the travel agent who sold her the cruise. The Raskin court granted summary judgment in favor of the travel agent, holding that:

> "plaintiff's claims of negligence and unseaworthiness against the travel agent must fail since it did not own, operate or manage the vessel. With respect to plaintiff's third cause of action that [the defendant] was negligent in investigating the ship's safety, the court stated that [the defendant] as a travel agency 'did not stand in a relationship vis-a-vis plaintiff such as to owe a duty to her to investigate the safety of the vessel. Defendant agreed to arrange a tour and supply a ticket to plaintiff. It did not insure her safety aboard the vessel.' The [Raskin] court also disposed of plaintiff's contentions that Sovereign's brochure expressly warranted the vessel's safety and seaworthiness by ruling that statements that the vessel meets certain safety standards 'falls woefully short of imposing liability upon [the defendant] for breach of express warranty...' See also Weiner v. British Overseas Airways Corp., 60 A.B.2d 427, 401 N.Y.S.2d 91 (2d Dept. 1978)." Lavine, 519 F.Supp. at 337.

These latter cases are strikingly similar to the one at hand. Plainly American Trans Air does not own, operate or manage the Holiday Inn. American Trans Air does not stand in a relationship vis-a-vis plaintiff such as to owe her a duty to investigate the safety of the hotel. Defendant American Trans Air at no time expressly or contractually warranted plaintiffs' safety. The tour brochure expressly provides to the contrary. Defendant American Trans Air, Inc.'s motion for summary judgment is GRANTED.

For the purposes of the remaining motions to dismiss, the Court will again treat as true the statement of the facts set out earlier in this opinion. Holiday Inns, Inc. and Humphreys (Cayman) Ltd. have both filed motions to dismiss based on lack of personal jurisdiction on the grounds of forum non conveniens. Humphreys further has filed a motion to dismiss for lack of subject matter jurisdiction, which motion the Court will next undertake.

The defendant Humphreys asserts that jurisdiction of the subject matter is lacking in this case. Humphreys as a corporation incorporated under the laws of the Cayman Islands, having its principal place of business in Georgetown, Grand Cayman, Cayman Islands, British West Indies, is not a foreign state for purposes of federal diversity jurisdiction says the defendant. Defendant cites the case of St. Germain v. West Bay Leasing, Ltd., No.CV-81-3945 (E.D.N.Y. Sept. 28, 1982) for that proposition. That case does indeed hold that the Cayman Islands is not a "foreign state" for purposes of diversity. Plaintiffs however cite the cases of Bally Export Corporation v. Balicar, Ltd., 804 F.2d 398 (7th Cir. 1986); David H. Elliott, Inc. v. Caribbean Utilities Co., Ltd., 513 F.2d 1176 (6th Cir. 1975); Rolls Royce (Canada), Ltd. v. Cayman Airways, Ltd., 617 F.Supp. 17 (N.D. Fla. 1985); and Lehman v. Humphrey Cayman, Ltd., F.2d 339 (8th Cir. 1983), all in opposition to the defendant's position.

The Bally Export Corporation case indicates that the federal court's jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332. 804 F.2d at 399. The defendant Balicar, Ltd. was a corporation organized under the laws of Cayman, a part of the British West Indies, with its principal place of business in Georgetown, Grand Cayman, British West Indies, just as the defendant in the instant action. Default judgment had been entered against defendant Balicar, Ltd. and an issue on appeal was the question of jurisdiction. The case involved personal jurisdiction rather than subject matter jurisdiction, and does not in fact discuss subject matter jurisdiction although subject matter jurisdiction

under the rules is certainly an issue that can be brought up at any time. If the Seventh Circuit had felt that it were an issue it certainly would have raised it.

The Elliott v. Caribbean Utilities Company, Ltd. case from the Sixth Circuit also dealt with personal jurisdiction rather than subject matter jurisdiction regarding a Cayman Islands corporation. Certainly the opportunity there was present to deal with subject matter jurisdiction and the Court instead accepted subject matter jurisdiction and exercised personal jurisdiction. The Rolls Royce v. Cayman Airways case from the Southern District of Florida specifically held that subject matter jurisdiction was available even though under the facts of that case a motion to dismiss for forum non conveniens was granted.

The Lehman v. Humphrey Cayman Ltd. case is strikingly similar to the case at hand. Therein, the Eighth Circuit found that the Federal Court of the Northern District of Iowa could exercise personal jurisdiction over Humphrey Cayman, Ltd. in a matter involving an alleged tort on an Iowa guest at the Grand Caymanian Holiday Inn. It appears that the only precedent for the defendant's subject matter jurisdiction position is the St. Germain case previously cited. The Court finds the cases cited by the plaintiffs to be more persuasive and follows those precedents rather than the St. Germain precedent. The Court therefore OVERRULES defendant Humphreys' motion to dismiss for lack of subject matter jurisdiction.

There remains the defendants' motion to dismiss for lack of personal jurisdiction. Both defendants Holiday Inns, Inc. and Humphreys (Cayman) Ltd. assert that the incident in question and the events surrounding the incident do not confer jurisdiction on the Southern District of Indiana. It is by now no mystery that the Indiana long-arm statute, codified as Indiana Trial Rule 4.4 (West 1985) extends personal jurisdiction of the Court sitting in Indiana including federal courts to the limits permitted under the due process clause of the Fourteenth Amendment. First National Bank

of Louisville v. Bezema, 569 F.Supp. 818, 819 (S.D. Ind. 1983); Oddi v. Mariner-Denver, Inc., 461 F.Supp 306, 308 (S.D. Ind. 1978); Wallace v. Herron, 778 F.2d 391 (7th Cir. 1985). Thus, the inquiry into the matter is whether the district court could consistent with due process assert personal jurisdiction over Humphreys and Holiday Inns.

It is often cited that International Shoe Company v. Washington, 326 U.S. 310, 316 (1945) holds that due process requires that the defendant have "certain minimal contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'". The Supreme Court has further defined those "minimal contacts" to be "continuous and systematic... activities" in the forum. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 444 (1952). More contemporaneously the Supreme Court stated in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985): "The constitutional touchstone remains whether the defendant purposefully established 'minimum contacts in the forum state'". Id. at 474. In Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) the Court held that the defendant's conduct and connection with the forum state should be such that the defendant would reasonably anticipate being subjected to the jurisdiction of the forum court. Id. at 297.

In the case of Asahi Metal Industry Company, Ltd. v. Superior Court of California, 107 S.Ct. 1026 (1987) we find the following quotation:

> "The placement of a product into the stream of commerce without more is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as a sales agent in the forum State." Id. at 1033.

We find also in the Asahi case a focus on the contacts of the defendant with the forum State. "The 'substantial connection'... between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." 107 S.Ct. at 1033. (Emphasis in original, citations omitted.)

The Court is mindful that the plaintiff in this case is not a resident of the state of Indiana. Plaintiffs' contacts with the State are through the defendant America Trans Air, Inc. and its relationship to the other two defendants. In Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779-80 (1984), the Supreme Court said:

> "But we have not to date required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a non-resident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking. In Perkins v. Benguet Mining Co., 342 U.S. 437 (1952) none of the parties was a resident of the forum State; indeed, neither the plaintiff nor the subject matter of his action had any relation to that State. Jurisdiction was based solely on the fact that the defendant corporation had been carrying on in the forum 'a continuous and systematic but limited part of its general business'. In the instant case respondent's activities in the forum State may not be so substantial as to support jurisdiction or a cause of action unrelated to those activities. But respondent is carrying on "part of its general business" in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire." Id. at 438.

Also, the Keeton court stated:

> "plaintiff's residence in the forum State is not a separate requirement and the lack of residence will not defeat jurisdiction established on the basis of defendant's contacts". Id. at 780.

As we deal in this case with both Holiday Inns, Inc. and Humphreys, Rush v. Savchuk, 444 U.S. 320, 332 (1980), reminds us that: "The requirements of International Shoe... must be met as to each defendant over whom a state court exercises jurisdiction". And, finally, in Burger King, the Supreme Court cautions us that: "Minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities". 471 U.S. at 477-78.

As we begin our analysis of the particular facts in the instant case it is then extremely important that we focus on whether the defendants have been carrying on in the forum a continuous and systematic part of their general business, intending to serve the market in the forum state so that the defendant should reasonably anticipate being hailed into court in Indiana. Both sides cite authority for their respective positions on jurisdiction. The Court will turn first to those citations of the defendants.

Defendants cite the case of Oddi v. Mariner-Denver, Inc., 461 F.Supp. 306 (S.D. Ind. 1978) which involved a suit filed in the Southern District of Indiana by an Indiana resident alleging she had been injured in a Colorado Holiday Inn. Judge Steckler in that case examined carefully the facts of the case. The plaintiff alleged that she was a guest at the Holiday Inn in Denver operated by Mariner-Denver under a license or franchise agreement with Holiday Inn of America, Inc. The Court looked closely at the contacts that the plaintiff had with the defendant while she was in Indiana. The Court was concerned that the plaintiff claimed that she chose to stay in this particular Holiday Inn because of advertising; however, there was no allegation as to where that advertising took place. The Court took as true the information contained in the affidavit of the Secretary-Treasurer of defendant that the corporation did not regularly do or solicit business or engage in any other persistent course of conduct or derive

substantial revenue or benefit from goods, materials or services used or rendered in Indiana.

The Oddi court cited a case from the Middle District of North Carolina, Bryson v. Northlake Hilton, 407 F.Supp. 73, (M.D.N.C. 1976) which found no personal jurisdiction when a North Carolina resident had been injured in a Georgia Hilton. The Bryson court found the Georgia Hilton did benefit from the reputation of Hilton franchises in North Carolina and was a part of a general network of motels that solicited business in North Carolina, and made use of and was part of the reservation service available at Hilton Inn in North Carolina, and that brochures advertising the Georgia Hilton were found at the North Carolina Hilton Inn. In any case, the Bryson court found that that degree of solicitation could hardly be considered "substantial" as that term is used in long-arm jurisdiction litigation. Fundamentally, the Oddi case involved no allegations that the defendant itself did business in Indiana and the only contact with the State of Indiana was that the defendant rented a room to an Indiana citizen.

Defendant also cites the case of Eric Carlsen v. Humphreys (Cayman) Ltd. and Holiday Inns, Inc., a memorandum order of the United States District Court for the District of Minnesota, Cause No. 3-87 CIV 45. That case involved a plaintiff in the Cayman Islands on a college program staying at an inn other than the Holiday Inn wherein the allegedly tortious incident occurred evidently on the Holiday Inns' property. That court specifically noted that the plaintiff did not contend that he had made any arrangements with or contacted any representatives of these defendants in Minnesota while he was a resident of Minnesota in regard to his trip to the Cayman Islands prior to his departure. The plaintiff in that case instead relied for minimal contacts on the defendants' general advertisements and solicitations within the State of Minnesota. While those advertisements and solicitations did not come to his personal attention he said that he had a general awareness of the defendants' hospitality and that he gravitated

toward the defendants' property in the Cayman Islands as a result of his awareness. He was in fact not actually aware of the Holiday Inns' presence on the Cayman Islands until he arrived there. The Minnesota court denied jurisdiction, not surprisingly.

Defendants further cite the case of Szakacs v. Anheuser-Busch Companies, Inc., 644 F.Supp. 1121 (N.D. Ind. 1986). That case involved an Indiana resident who tripped and fell on an alleged dangerous and defective sidewalk at Busch Gardens in Tampa, Florida. The court in that case was concerned that defendant Anheuser-Busch conducted an advertising campaign in Indiana as well as other states promoting Busch Gardens generally and that the plaintiffs were aware of Busch Gardens due to that general advertisement on the part of the defendant, but "no reservations or contacts were made with Busch Gardens prior to the vacation trip". Id. at 1122. The Court therein cited the Supreme Court case of Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984) for the proposition that: "Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction where there are sufficient contacts between the State and the foreign corporation". 466 U.S. at 414. In addition, the Northern District cited Helicopteros Nacionales for having:

> "distinguished 'specific jurisdiction' where the defendant's conduct creates the cause of action and confers jurisdiction on the forum State from 'general jurisdiction' where personal jurisdiction is conferred upon the forum State due to the defendant's general contacts with the State rather than the conduct which created the cause of action". Szakacs, 644 F.Supp. at 1125.

The Northern District pointed out that the conduct within the State upon which the plaintiff was relying for minimal contacts was an advertising campaign. The court further observed that the plaintiff's cause of action didn't arise out of the advertising

campaign. The court concluded that in order to find the requisite general jurisdiction over the defendants, the defendants would had to have knowingly solicited the business of the plaintiffs with more than just a general advertising campaign. It was noted that the plaintiffs did not allege any forum State contractual agreement with the defendants. For those reasons the court found no jurisdiction in the Northern District of Indiana.

It is fair to conclude from a review of all the cases cited by both parties that in an instance in which a forum plaintiff is injured on a non-forum premises by the alleged negligence of a non-forum defendant, minimum contacts means more than a general advertising campaign on the part of the non-forum defendant in the forum state. What more contacts with Indiana did the defendants in this cause have than general advertising? Humphreys had, as recited in the facts, an ongoing beneficial relationship with a forum travel club. Its representatives came to Indiana on occasion to negotiate business with the Indiana travel club. Reservations were made in Indiana. Extensive advertisement of more than just the national magazine and high circulation newspaper variety is present. Specifically, forum directed advertisement in a forum based newsletter is present.

While general advertising alone has never been held by itself to establish the minimal contacts requirement for personal jurisdiction, there are several cases reported that examine advertising as it might reflect the concern of the Supreme Court in Asahi, supra, that courts look for an "intent or purpose to serve the market in the forum State". Asahi, at 1033. Hutter Northern Trust v. Door County Chamber of Commerce, 403 F.2d 481, 485 (7th Cir. 1968) is a pre-Asahi case wherein it was recognized that the transaction of business through active and regionally pointed solicitation by the non-forum defendant in the forum State provided the requisite minimal contacts. Therein a Wisconsin County Chamber of Commerce was found to have devoted a "substantial share of its energy" to forum solicitation. The court

found that 90% of the defendant's business was derived from the forum tourists. The court found that "the Chamber has purposefully availed itself the privilege of conducting activities within [the forum] and thereby invoked the benefit of its laws".

Gavigan v. Walt Disney World, Inc., 646 F.Supp. 786 (E.D. Pa. 1986) examines the minimal contact vis-a-vis advertising circumstance. The court retained jurisdiction over Disney World examining closely the nature of the advertising used by Disney World directed to citizens of Pennsylvania, the forum State. The court found extensive in-forum solicitation from "Walt Disney World Days at Jon Wanamaker" to a "Disney Salutes Philadelphia" to giving the mayor of Philadelphia an honorary Disney World citizenship. These specifically forum aimed promotional marketing advertising activities were found sufficient to give a Pennsylvania court jurisdiction over a controversy between a forum plaintiff and a non-forum defendant involving a non-forum tort. The Gavigan Court distinguished local precedents on precisely these grounds. See Gavigan, 656 F.Supp. 786, distinguishing Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539 (3d Cir. 1985); Slota v. The Moorings, 343 Pa. Super. 96 at 108, 494 A.2d 1 at 6 (1985) and Whalen v. Walt Disney World, Inc., 274 Pa. Super. 246, 418 A.2d 389 (1980).

A similar case voicing similar concerns is Makopoulos v. Walt Disney World, Inc., et. al., 221 N.J. Super. 513, 535 A.2d 26 (1987). Therein, the New Jersey plaintiff tried to assert in personam jurisdiction over the non-forum defendant in the matter of an alleged non-forum tort. The court concerned itself with the nature of defendant's advertisements as minimal contacts. That court opined: "It is difficult to perceive a distinction between the drummer of earlier days whose presence at the front door created jurisdiction and the modern television campaign which seeks the same end and comes into the home to do it". Id. at 27. Further the court said: "Thus it may well be that advertising, and particularly television advertising, can create sufficient contacts to justify in

personam jurisdiction". Id. at 28. The court sent the case back to the lower court to develop the facts with this thought: "Sufficient facts are suggested which if properly developed might permit a conclusion that defendant purposely directed his solicitation to residents of this forum, see Burger King Corp. v. Rudzewicz, supra, 471 U.S. at 472-73, 105 S.Ct. at 2182-83, and could reasonably expect to be 'haled into court' here. See World-Wide Volkswagen Corp. v. Woodson, supra, 444 U.S. at 297, 100 S.Ct. at 567." Makopoulos, 535 A.2d at 28-29.

The instant case involves more than general advertising. It involves some presence in Indiana of Caymanian representatives to negotiate with the airlines. In Wisconsin Electric Manufacturing Co., Inc. v. Pennant Products, 619 F.2d 676 (1980) the court found the presence in the forum State of the non-forum representatives on two occasions dealing with significant matters out of which the controversy arose to supply the requisite minimal contacts. As characterized by Madison Consulting Group v. State of South Carolina "the mere existence of 'a footfall on the State's soil'" is not sufficient in and of itself to establish minimal contacts. 752 F.2d 1193, 1200 (7th Cir. 1985)(quoting Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 509 (4th Cir. 1956). Yet in an area of the law wherein the courts are left in the words of Judge Learned Hand to "step from tuft to tuft across the morass"1/, a footfall on the forum tuft might support the judicial leap of faith across the morass.

Plaintiffs cite the case of Lehman v. Humphrey Cayman Ltd., 713 F.2d 339, and lay stress on the finding of the Eighth Circuit Court of Appeals in that case. Quoting directly from the case regarding the facts:

> "Lehman's action stems from the presumed death of her husband Robert Wayne Lehman while he was a guest at

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1/As quoted by Judge Steckler in Oddi v. Mariner-Denver, Inc., supra.

the Grand Caymanian Holiday Inn in the Cayman Islands. Victoria Lehman is a citizen of the State of Iowa, as was Robert Lehman before his death. Humphrey Cayman Ltd. is a corporation organized under the laws of the Cayman Islands and maintains corporate offices in Tennessee. Humphrey Cayman, Ltd. owns and operates the Grand Caymanian Holiday Inn and is a franchisee of Holiday Inns. Holiday Inns is a Tennessee corporation and maintains a registered agent in Iowa. Robert Lehman and his son were guests of the Grand Caymanian Holiday Inn for several days in November of 1980. On November 21st Robert Lehman rented a 16 foot 'Hobie-Cat' sailboat from a sailboat rental shop, Bob Serto's Diving Ltd., located on the hotel premises. Robert and two other persons set sail on the Caribbean Sea. Several hours later observers informed the manager of the sailboat rental shop that Robert Lehman's sailboat was not visible from the shore, an air search was launched, searchers eventually discovered only the wreckage of the sailboat; Lehman and his two companions are presumed dead." 713 F.2d at 340.

The District Court in that case had held that it had exercised personal jurisdiction over the defendants, but it granted the defendant's motion to dismiss for forum non conveniens. The Circuit Court made specific findings in this case that deal with a personal jurisdiction issue in any case:

"In this case, Robert Lehman was not doing business abroad on a daily basis but instead was pursuing a personal vacation of a few days' duration in a vacation spot located just outside the United States. In arranging his vacation he dealt with an American corporation and relied on the defendants' representations received by him in Iowa. The defendants, on the other hand, actively solicited business in the United States, were incorporated or at least maintained corporate offices here, and fairly could be expected to anticipate and take into account the cost of defending a lawsuit brought in a United States forum." Id. at 347.

The Circuit Court focused on several factors:

"Robert Lehman was a resident of Iowa, the defendants engaged in a systematic advertising effort to generate

> business in Iowa, the representations regarding the hotel and its facilities were directed at Robert Lehman and his son in Iowa, and the hotel reservations were made through a travel agency in Iowa." Id. at 344.

The court in a footnote also recognized that the District Court had determined in deciding to exercise personal jurisdiction that "it is quite likely that Lehman and his son would never have chosen the Grand Caymanian if Cayman had not engaged in a systematic effort to generate business in Iowa". Id., n.3.

In the cases cited by the defendant in this case no such contacts have been present in the forum State. In Szakacs the only contact was a general advertisement campaign. In Oddi the only contact was the plaintiff herself. In Bryson the only contacts were general advertising and a brochure left in each Hilton advertising other Hiltons. In Carlsen only general advertisement was alleged. The instant case is certainly far closer to the Lehman case. Here the advertisement was fairly specific to members of the Ambassadair Club, an Indiana based group. The nature of the advertising was extensive and forum specific for the use of an Indiana based travel club and to its members, one of whom, of course, was the plaintiff. Certainly plaintiffs in this case would not have been at the Grand Caymanian Hotel had it not been for the Grand Caymanian's associations with an Indiana travel club. In addition, plaintiffs having made reservations in Indiana, defendants having been in Indiana on several occasions negotiating rates with the tour club, and a substantial benefit being derived from the forum by the defendant are all important considerations in finding minimal contacts. It seems to the Court that these taken together indicate an intent to serve the Indiana market. It seems reasonable for Humphreys (Cayman) Ltd. to be "haled" into Indiana.

It is this Court's opinion that Lehman v. Humphreys Cayman, Ltd., 713 F.2d 339, is controlling in the case at bar, re Holiday Inns. The facts are extremely similar, the defendants are the same, the contacts with the forum are similar, the only difference being

that the plaintiffs in the instant case are not residents of the forum. However, after the analysis of the Supreme Court in Keeton v. Hustler Magazine it is clear that the plaintiffs' residence is not the focus. And not only is the Lehman case dispositive of the motion regarding personal jurisdiction, re Holiday Inns, but it seems to the Court is also dispositive on the issue of forum non conveniens. The interests discussed by the Lehman court are the same.

Therefore, the motions of the defendants Humphreys (Cayman) Ltd. and Holiday Inns, Inc. to dismiss are OVERRULED pursuant to Lehman v. Humphrey Cayman, Ltd. and Holiday Inns, Inc., 713 F.2d 339 (8th Cir. 1983) cert. denied 464 U.S. 1042, 104 S.Ct. 708, 79 L.Ed.2d 172 (1984).

DATED this 25th day of March, 1988.

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 21, 1990.

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. HUBERT L. WILL, Senior District Judge*

DOROTHY A. WILSON and LOUIS P. WILSON, Plaintiffs-Appellees,	)	Appeal from the United States District Court, Southern District of Indiana, Indianapolis Division.
Nos. 88-2495 and 88-2496	v.)	
HUMPHREYS (CAYMAN) LTD., a corporation, and HOLIDAY INNS, INC., a corporation. Defendants-Appellants.	)	No. 86 C 197. Larry J. McKinney, Judge.

ORDER

On consideration of the petition for rehearing filed by defendant-appellant Humphreys (Cayman) Ltd. on November 6, 1990, a majority of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

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* Judge Will, Senior District Judge, Northern District of Illinois, sitting by designation.

Supreme Court, U.S.
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No. 90-1243

In The

Supreme Court of the United States

October Term, 1990

HUMPHREYS (CAYMAN) LIMITED,

Petitioner,

v.

DOROTHY A. WILSON AND LOUIE P. WILSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a foreign corporation that operates a hotel in another country and which has since at least 1976 established a continuing commercial, contractual relationship with an Indiana tour company for the purpose of obtaining business from Indiana for its hotel, may, consistently with due process, be required to defend in Indiana an action brought by a guest of the hotel for injuries suffered in the hotel, where the guest made reservations at the hotel in Indiana through the Indiana tour company as a result of the petitioner's promotional efforts?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Statement of the Case 1

Summary 5

Argument 7

I. Exercise of Personal Jurisdiction Over the Petitioner In Indiana is Consistent With Due Process 7

II. The Petitioner Has Presented No Substantial Reason For Review by This Court Of The Seventh Circuit's Decision Upholding Jurisdiction Over Petitioner 12

Conclusion 14

TABLE OF AUTHORITIES

Page

CASES

Asahi Metal Industry Co., Ltd. v. Super. Ct. of Cal., Solano Cty., 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) 9, 10

Burger King Corporation v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) 9, 12

Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) 8

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) 11

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) 8

OTHER AUTHORITY

Supreme Court Rule 10 12

STATEMENT OF THE CASE

Petitioner, Humphreys (Cayman) Limited, is incorporated under the laws of the Cayman Islands. It is a licensee of Holiday Inns, Inc. and operates a hotel in the Cayman Islands under authority of that license. Petitioner maintains a corporate office in Memphis, Tennessee and has operated a reservations office in Miami, Florida. App. 2a. (All references are to the appendix contained in the Petition for Writ of Certiorari.)

Since 1976, petitioner has participated in a continuing commercial relationship with American Trans Air (American) to provide accommodations for tours run by American to the Cayman Islands. App. 2a. American is a travel club and tour operator incorporated under the laws of the State of Indiana and has its principal place of business in Indiana. App. 21a.

As part of its relationship with American, petitioner sent officers to Indianapolis, Indiana to meet with representatives of American. During a trip to Indiana in the summer of 1981, petitioner's representatives negotiated a long-term contract with American by which a certain number of rooms at petitioner's hotel would be guaranteed at a reduced rate for American-run tours, with American tour leaders receiving free accommodations. App. 2a-3a.

Contracts between American and petitioner have been negotiated periodically, usually a year in advance. The contracts include negotiated rates, guaranteed room availability, minimum numbers of guests for petitioner's hotel, commission rates payable to American or net rates

for rooms to be charged to American, and free accommodations available to American personnel accompanying a tour. App. 22a.

American frequently has listed trips to the Cayman Islands in its regular advertising brochures and has included specific references to petitioner's hotel. App. 3a. Since 1978, advertisements for 131 tours specifically offering accommodations at petitioner's Holiday Inn have been published in American's travel bulletins, and tours to the Cayman Islands are offered by American as frequently as two or three times a month. In addition to including specific advertisements of petitioner's hotel in the tour listing, separate advertisements for the Cayman Islands tours which include solicitation of accommodations at petitioner's hotel are also published in American's travel bulletins. American obtains information for these advertisements of petitioner's Holiday Inn from brochures furnished by petitioner. The advertisements are made with petitioner's knowledge and encouragement. App. 22a.

Petitioner advertises extensively in national magazines directed both at travel agents and potential travelers. In addition, petitioner mails brochures and rate cards to travel agents generally, and has mailed such material to American and its subsidiary, Ambassadair, knowing that it would be circulated to Ambassadair's membership. App. 3a, 22a-23a.

Petitioner concedes that "it is probable that some or all of these advertisements, listings and related materials were sent or made available to persons or entities in

Indiana". App. 23a. Petitioner also advertises in newspapers, some of which, such as the Chicago Tribune, petitioner concedes "were probably seen in Indiana by Indiana subscribers to those newspapers." Petitioner maintains nationwide toll free numbers to be used by residents of Indiana and other states for the purpose of making reservations. All of these promotional activities are done purposefully by petitioner to obtain business for its hotel. "Through its advertising and promotional activities, [petitioner] obviously encourages the intermediaries to place reservations on their own behalf or on behalf of their clients with [petitioner's] hotel." App. 23a. Records produced by petitioner include checks issued by Ambassadair between December 21, 1982 and March 25, 1986, totalling $239,810.76. App. 23a.

Respondents participated in a tour organized by American that left Indianapolis International Airport on October 28, 1984. The group stayed at petitioner's hotel in the Cayman Islands. Arrangements for the trip were made as a result of advertisements for the tour that appeared in American's travel bulletin. App. 3a. Both the tour listing and the advertisement for the Cayman Island trip included references to accommodations at petitioner's Holiday Inn. App. 23a. Arrangements were made with American's tour subsidiary, Ambassadair, and payment was made to Ambassadair in Indianapolis, Indiana. App. 3a.

At page 2 of the Petition, it is stated that "American, however, did not act as an agent for petitioner; American had no authority to bind petitioner and it did not purport to do so." This statement is taken from the dissenting opinion of Judge Will. App. 14a-15a. Petitioner did not

contest any finding of fact by the District Court and there is no finding of fact by the District Court or in the majority opinion of the Appellate Court to support this statement.

On the facts found by the District Court and the Appellate Court, American had authority pursuant to its contracts with petitioner to accept reservations in Indiana for rooms which petitioner had guaranteed would be available for American's tour group members, and indeed the contract required American to obtain reservations for a minimum number of rooms at the petitioner's hotel. App. 2a-3a, 22a-23a. The District Court specifically found that the respondents' reservations at petitioner's hotel had been "made in Indiana." App. 36a, 40a.

Based on the foregoing findings, the District Court held that exercise of specific, personal jurisdiction over petitioner was consistent with due process because petitioner "had an ongoing beneficial relationship with a forum travel club. Its representatives came to Indiana on occasion to negotiate business with the Indiana travel club. Reservations were made in Indiana. Extensive advertisement of more than just the national magazine and high circulation newspaper variety is present. Specifically, forum directed advertisement in a forum based newsletter is present." App. 36a.

The Appellate Court affirmed, finding that "The conduct engaged in by [petitioner] in Indiana is certainly sufficient to satisfy specific jurisdiction. [Petitioner] advertised in the state of Indiana, entered into a long-term arrangement with an Indiana corporation to provide a guaranteed number of rooms to be used in connection

with tour packages that departed from Indiana, and sent representatives to Indiana to negotiate the contract. In short, [petitioner] established a continuing commercial relationship with an Indiana tour company with the expectation that its service (providing accommodation) would be purchased by residents of Indiana (and other states). . . . [Petitioner], by its own business conduct, had purposefully availed itself 'of the privilege of conducting activities within the forum State, thus, invoking the benefits and protections of its laws.' (Citation omitted.) It should have 'reasonably anticipate[d] being haled into court there.' (Citation omitted.)." App. 8a-9a.

SUMMARY

The petition for writ of certiorari should be denied because the petitioner's purposeful and continuous commercial contacts with Indiana are amply sufficient to permit the exercise and specific personal jurisdiction over the petitioner by the United States District Court for the Southern District of Indiana pursuant to Indiana Trial Rule 4.4 consistent with the Due Process Clause of the Fourteenth Amendment as interpreted and applied by prior decisions of this Court.

The facts establish that petitioner has purposefully availed itself of the privilege of conducting business activities in Indiana. For more than a decade, petitioner has continuously engaged in a systematic promotional effort in Indiana which specifically targeted the Indiana tourist market and even more particularly targeted the market served by American Trans Air, an Indianapolis

based travel club and tour operator. Petitioner's efforts included visits to Indiana by petitioner's officers to negotiate long-term contracts with American pursuant to which American, among other things and in exchange for commissions and free accommodations for its tour guides, agreed to fill minimum numbers of rooms at petitioner's hotel, which petitioner in turn guaranteed it would provide at a specific rate.

Petitioner knowingly encouraged promotion of its hotel by American. Petitioner provided the information based upon which American prepared the ads and also provided rate cards and brochures for redistribution by American to its members. Petitioner guaranteed the availability of a minimum number of rooms for American's tour groups so that accommodations at its hotel could be included as part of American's tour package. Respondents' reservation of accommodations at petitioner's hotel resulted directly from the advertisements for the hotel published with petitioner's knowledge and encouragement in an American tour bulletin and because of the inclusion of petitioner's hotel in the tour's ground package.

The respondents made and paid for their reservations in Indiana. The innkeeper-guest relationship which was thus formed between the respondents and the petitioner, and out of which respondents' claims arise, was the specific type of business transaction which petitioner purposefully solicited through its advertising and contracts with American in Indiana.

Further, the petitioner has presented no substantial reason for review by this Court. The petitioner has not

argued that the decision of the Seventh Circuit is in conflict with a decision of another United States court of appeals or a state court of last resort, nor has it argued that the Seventh Circuit has departed from the accepted and usual course of judicial proceedings. Neither has petitioner argued that the Seventh Circuit has in this case decided an important question of federal law which has not been settled by this Court or that its decision conflicts with applicable decisions of this Court.

Petitioner relies on this Court's grant of certiorari in *Carnival Cruise Lines, Inc. v. Shute*, No. 89-1647 as the basis for its petition. However, the petitioner's purposeful contacts with Indiana in this case are well within the due process requirements previously established by this Court for the exercise of specific personal jurisdiction over a nonresident defendant. Accordingly, even if this Court holds that Carnival Cruise Lines' contacts with the State of Washington are not sufficient to meet the jurisdictional requirements of the Due Process Clause, such a decision would have no necessary impact on the Seventh Circuit's decision upholding jurisdiction over petitioner in this case.

ARGUMENT

I. EXERCISE OF PERSONAL JURISDICTION OVER THE PETITIONER IN INDIANA IS CONSISTENT WITH DUE PROCESS

The United States District Court for the Southern District of Indiana held that the petitioner's purposefully established contacts with the State of Indiana were sufficient to subject the petitioner to personal jurisdiction in

Indiana with regard to the respondents' claims, consistent with the requirements of the Due Process Clause. A majority of the Seventh Circuit affirmed, holding that "[Petitioner], by its own business conduct, had purposefully availed itself 'of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' (Citation omitted.) It should have 'reasonably anticipate[d] being haled into court there.' (Citation omitted.)."

This Court has already clearly delineated the requirements of the Due Process Clause which must be met in order for a defendant to be subject to specific personal jurisdiction in a forum of which it is not a resident. The defendant must itself establish minimum contacts in the forum State by "some act [through] which [it] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). "[T]he defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). The requirement that the defendant have "fair warning" that its activities may subject it to the jurisdiction of the forum State "is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. [770, 774], 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and the litigation results from alleged injuries that 'arise out of or relate to' those activities, *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. [408, 414], 104 S.Ct. 1868, 1872,

80 L.Ed.2d 404 (1984)." *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985).

Jurisdiction cannot be predicated solely on "random," "fortuitous," or "attenuated" contacts. "Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State. *McGee v. International Life Insurance Co., supra*, 355 U.S., at 223, 78 S.Ct., at 201; see also *Kulko v. California Superior Court, supra*, 436 U.S., at 94, n.7, 98 S.Ct., at 1698, n.7. Thus where the defendant 'deliberately' has engaged in significant activities within a State, *Keeton v. Hustler Magazine, Inc.*, 465 U.S., at [781], 104 S.Ct., at [148], or has created 'continuing obligations' between himself and residents of the forum, *Travelers Health Assn. v. Virginia*, 339 U.S., at 648, 70 S.Ct., at 929, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." (Emphasis in original; footnote omitted). *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 475-476, 105 S.Ct. 2174, 2183-2184, 85 L.Ed.2d 528 (1985).

In *Asahi Metal Industry Co., Ltd. v. Super. Ct. of Cal., Solano Cty.*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), the Court identified the following factors as indicia of an intent or purpose of the defendant to serve the market of the forum State: "designing the product for the market in the forum State, advertising in the forum State,

establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi Metal Industry Co., Ltd., supra,* 480 U.S., at 112, 107 S.Ct., at 1032.

As the District Court found, many if not all of these factors are present in this case, in addition to the physical presence of petitioner's officers in Indiana for the purpose of negotiating contracts with American, thus supporting the conclusion that petitioner has indeed purposefully availed itself of the privilege of conducting part of its general business activities in Indiana with the specific purpose of serving the Indiana market.

Applying the jurisdictional principles already established by this Court to the facts regarding petitioner's activities which have been directed to the State of Indiana, it is clear that the exercise of jurisdiction in this case is proper. Since at least 1976, petitioner has undertaken a systematic and deliberate attempt to target the Indiana market. As a direct result of its efforts, residents of Indiana (and Illinois) have stayed at petitioner's hotel in the Cayman Islands through the tours conducted by American. Not only has petitioner mailed brochures and other advertising matter to American and other Indiana residents, it also acknowledges that it has placed advertisements in newspapers which are circulated to Indiana subscribers and has mailed brochures to American knowing that American intended to redistribute those brochures to its members. Beyond this, there has been a constant flow of correspondence and contract documents over a period of more than a decade between petitioner

and American, and perhaps most importantly, representatives of petitioner, including an executive vice-president and two other officers, have been in Indiana on several occasions for the express purpose of negotiating tour packages with American.

In addition, petitioner and American have regularly entered into long-term contracts for the booking of tour groups in connection with which petitioner guarantees blocks of rooms for American's tours. The facts discovered thus far reveal that as a result of all these activities directed by petitioner at the Indiana market, petitioner has received almost $240,000.00 just during the period from December, 1982 to March, 1986, from American tours originating in Indiana, including the tour of which respondents were members.

There is a substantial nexus between the petitioner's deliberate activities directed toward Indiana and the respondents' claims in this case. The respondents' claims against petitioner arise out of the innkeeper-guest relationship with petitioner which was established in Indianapolis, Indiana and was the specific type of business transaction which petitioner sought to obtain through its advertising and contracts with American in Indiana. The fact that respondents are not citizens of Indiana is not critical to the issue of jurisdiction over petitioner. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), explicitly held that the "plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." *Keeton, supra*, 465 U.S. at 780, 104 S.Ct. at 1481.

The strong relationship between the petitioner, the forum and the litigation provides a firm foundation for personal jurisdiction over petitioner in this case. The petitioner, having purposefully derived benefits from its activities in Indiana, cannot readily wield the Due Process Clause "as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King Corporation v. Rudzewicz, supra,* 471 U.S. at 474, 105 S.Ct. at 2183. "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corporation v. Rudzewicz, supra,* 471 U.S. at 477, 105 S.Ct., at 2184-2185. This petitioner has not done.

II. THE PETITIONER HAS PRESENTED NO SUBSTANTIAL REASON FOR REVIEW BY THIS COURT OF THE SEVENTH CIRCUIT'S DECISION UPHOLDING JURISDICTION OVER PETITIONER.

Supreme Court Rule 10 provides that "a writ of certiorari will be granted only when there are special and important reasons therefor." As argued above, the exercise of specific personal jurisdiction over petitioner in this case is well within the ambit of prior decisions of this Court. No other argument has been made by petitioner which would warrant the exercise of this Court's discretion to grant the petition.

The decision of the Seventh Circuit in this case is not in conflict with a decision of another United States court of appeals or a state court of last resort, nor has the

Seventh Circuit departed from the accepted and usual course of judicial proceedings. Further, the requirements of the Due Process Clause which govern the issue presented by the petition have been well settled by this Court and the decision of the Seventh Circuit is in accord with those requirements.

Petitioner relies heavily on this Court's grant of certiorari in *Carnival Cruise Lines, Inc. v. Shute*, No. 89-1647 as the basis for its petition. However, as demonstrated above, the petitioner's purposeful contacts with Indiana in this case are well within the due process requirements previously established by this Court for the exercise of specific personal jurisdiction over a nonresident defendant. Accordingly, even if this Court holds that Carnival Cruise Lines' contacts with the State of Washington are not sufficient to meet the jurisdictional requirements of the Due Process Clause, such a decision would have no necessary impact on the Seventh Circuit's decision upholding jurisdiction over petitioner in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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